

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

DEC 19 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

LEE HOLMAN LACEY,

Appellant.

)
)
) 2 CA-CR 2008-0105
) DEPARTMENT B
)

MEMORANDUM DECISION

)
) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20070709

Honorable Michael J. Cruikshank, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson

Tucson
Attorneys for Appellee

Law Offices of Thomas Jacobs
By Thomas Jacobs

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V Á S Q U E Z, Judge.

¶1 Following a jury trial, appellant Lee Lacey was convicted of fleeing from a law enforcement vehicle. The trial court sentenced him to an enhanced, presumptive prison term of five years.¹ On appeal, Lacey argues the court abused its discretion by admitting evidence of a police officer's out-of-court identification of Lacey and there was insufficient evidence to prove he had two or more prior felony convictions for sentence-enhancement purposes. For the following reasons, we affirm.

I. Factual and Procedural Background

¶2 On February 10, 2007, at approximately 8:00 p.m., two Pima County Sheriff's deputies, McNeely and Callejas, were parked in separate patrol cars near the intersection of Roger and Palm Grove Roads when they saw a green car with its trunk partially open turning onto Palm Grove from Roger Road. Callejas activated his patrol car's left alley light, illuminating the car as it drove by; the driver looked directly at the deputies. McNeely noticed that the car did not have a license plate light. He then followed the car to make a traffic stop, and as he did so, the car accelerated away from him at a high rate of speed.

¶3 McNeely pursued the car until he was instructed to terminate the chase for safety reasons. However, another deputy in a surveillance airplane continued observing the

¹Although the trial court's sentencing minute entry describes the prison term as mitigated rather than presumptive, we are able to ascertain the trial court's intention from the transcript of the sentencing hearing. We therefore correct this discrepancy on appeal. *State v. Contreras*, 180 Ariz. 450, 453 n.2, 885 P.2d 138, 141 n.2 (App. 1994). *See also State v. Hanson*, 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App. 1983) ("Where there is a discrepancy between the oral sentence and the written judgment, the oral pronouncement of sentence controls.").

car and saw the occupants abandon it in a mobile home park and run into a mobile home. He relayed this information to deputies on the ground, who arrived on scene and apprehended two men and a woman as they exited the back door of the mobile home. The deputies ordered the three to lie on the ground, and when McNeely arrived, he immediately identified Lacey as the driver of the vehicle. McNeely then placed him in handcuffs, put him in a patrol car, and informed him of his rights pursuant to *Miranda*.² Lacey was subsequently charged with fleeing from a law enforcement vehicle.

¶4 A jury found Lacey guilty as charged. Following a bench trial on the state's allegation of prior convictions, the court found the state had proved that Lacey had three historical prior felony convictions and sentenced Lacey as noted above.

II. Discussion

A. Reliability of Out-of-Court Identification

¶5 Before trial, Lacey filed a motion to suppress any in-court identification of him by McNeely and Callejas, arguing the out-of-court identification process essentially amounted to a one-man show-up and was thus unduly suggestive and unreliable. Following a hearing conducted pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P. 2d 951 (1969), the trial court found “the viewing by McNeely and Callejas of [Lacey] in the custody of other officers amounted to a suggestive procedure for in-court identification purposes.” However

²*Miranda v. Arizona*, 384 U.S. 436 (1966).

the court denied Lacey's motion because it concluded the identification was "nonetheless reliable."

¶6 On appeal, Lacey contends the trial court erred in admitting McNeely's out-of-court identification. He claims, as he did below, that the out-of-court identification was essentially a one-man show-up and, therefore, unduly suggestive and unreliable.³ One-man show-up identification procedures are inherently suggestive. *State v. Hicks*, 133 Ariz. 64, 68-69, 649 P.2d 267, 270-71 (1982). "However, even where the pretrial identification procedure is unduly suggestive, reliable identifications will be admitted." *State v. Cañez*, 202 Ariz. 133, ¶ 47, 42 P.3d 564, 581 (2002). And we will not overturn a trial court's decision concerning the reliability of an identification absent clear and manifest error. *State v. Atwood*, 171 Ariz. 576, 604, 832 P.2d 593, 621 (1992), *overruled in part on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001). In reviewing a motion to suppress, "we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings." *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008).

¶7 In determining reliability, we use the five factors outlined in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). They are: 1) the witness's opportunity to observe the

³Although Lacey's motion to suppress also challenged McNeely's in-court identification of him and Callejas's out-of-court and in-court identifications, Lacey does not re-urge these arguments in his opening brief. Consequently, he "has waived consideration of the other facets of this issue by failure to argue them in this appeal." *State v. Rodriguez*, 160 Ariz. 381, 384, 773 P.2d 486, 489 (App. 1989).

suspect; 2) the degree of attention of the witness; 3) the accuracy of a witness's prior identification; 4) the witness's level of certainty at the confrontation; and, 5) the amount of time that passed between the crime and the confrontation. *Id.*; *see also Hicks*, 133 Ariz. at 68, 649 P.2d at 271.

¶8 Lacey asserts McNeely only had an opportunity to observe him for two to three seconds, he initially described Lacey as Hispanic, and he did not see there was a passenger in the vehicle. Thus, Lacey maintains that “at least three of the *Biggers* factors . . . [—] opportunity to observe, attention[,], and accuracy of prior description[—]are highly suspect.”

¶9 At the *Dessureault* hearing, McNeely testified that when he initially had observed the driver, the car was traveling at a speed of only five to ten miles an hour. Additionally, he stated the alley light had shone directly on the driver's face and he and the driver had made eye contact. Although McNeely initially stated the driver was Hispanic, when he encountered Lacey at the mobile home park he immediately identified Lacey as the driver of the car, stating he was one hundred percent certain. Finally, the time between the initial observation and the out-of-court identification was no more than fifteen minutes. Based on these factors, we agree the trial court could reasonably find McNeely's out-of-court identification of Lacey reliable. The trial court therefore did not abuse its discretion in denying Lacey's motion to suppress the out-of-court identification. Furthermore, McNeely identified Lacey at trial, and Lacey is not challenging that identification on appeal. Thus, even assuming the court's admission of the out-of-court identification was error, it was

clearly harmless. *See State v. Richardson*, 18 Ariz. App. 329, 331, 501 P.2d 957, 959 (1972) (applying harmless error review to admission of out-of-court identification).

B. Sufficiency of Evidence to Prove Prior Convictions

¶10 Lacey also claims the trial court erred in finding there was sufficient evidence to prove his prior felony convictions, which were used to enhance his sentence. Specifically, he contends the state was required to present “testimonial evidence or other sufficient foundation” to establish that the records of the prior convictions related to him. “We review a trial court’s sentencing decisions for an abuse of discretion.” *State v. Hollenback*, 212 Ariz. 12, ¶ 9, 126 P.3d 159, 162 (App. 2005).

¶11 “The proper procedure to establish [a] prior conviction is for the state to offer in evidence a certified copy of the conviction . . . and establish the defendant as the person to whom the document refers.” *State v. Lee*, 114 Ariz. 101, 105, 559 P.2d 657, 661 (1976). That procedure was followed in the present case. At the bench trial on the allegation of priors, the state submitted the following documents as evidence of Lacey’s prior convictions: an Arizona Department of Corrections pen pak; certified copies of Pima County Superior Court records showing convictions for “Lee Holman Lacey” in cause numbers CR25798, CR53255, CR66229, CR67156; and Pima County Jail records that included Lacey’s photograph.

¶12 Relying on *Lee* and *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004), Lacey objected to the admission of the documents, arguing that a witness or further

proof was necessary to establish he was the person to whom the documents referred.⁴ The trial court rejected that argument, finding that *Lee* and *Cons* do not require “live witness testimony for purposes of identification.” We agree with the trial court. Certified copies of court records are self-authenticating documents under Rule 902(4), Ariz. R. Evid. As self-authenticating documents, the records “[we]re properly offered in support of [the state’s] allegation of prior convictions,” *Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d at 616, without the need for testimonial evidence to establish the documents referred to Lacey.

¶13 The supreme court’s decision in *State v. Carreon*, 210 Ariz. 54, 107 P.3d 900 (2005), supports our conclusion. There, the defendant stipulated to the introduction of conviction records, but, as Lacey does here, argued the evidence was insufficient to prove he had a prior conviction. *Id.* ¶¶ 49, 51. Although the state offered no additional evidence to support its allegation, the supreme court concluded the documentation “provided a sufficient basis for the jury to find, beyond a reasonable doubt, the existence of Carreon’s prior convictions. The documentation also provided a sufficient basis to identify Carreon as the person referred to in the documents.” *Id.* ¶ 54. *See also State v. Morales*, 215 Ariz. 59, ¶ 6, 157 P.3d 479, 481 (2007) (“[W]hether based on certified copies or other evidence, the trial court . . . determine[s] the existence of prior convictions as a factual finding after a hearing.”).

⁴Lacey did not challenge the admissibility of the documents on any other ground in the trial court, nor does he on appeal.

¶14 The trial court found numerous “points of correspondence” between the documents submitted by the state, “including physical description, tattoos, criminal history and numerical data, [which] establish that the person to whom each document pertains is [Lacey].”⁵ The record supports the trial court’s finding that he had three historical prior felony convictions. *See Morales*, 215 Ariz. 59, ¶ 13, 157 P.3d at 482 (finding prior convictions conclusively proven by certified copies of conviction records where neither party challenged authenticity); *see also Carreon*, 210 Ariz. 54, n.12, 107 P.3d at 911 n.12 (defendant sufficiently identified as person documents referred to based on physical description and tattoos). We see no error.

III. Conclusion

¶15 For the reasons stated above, we affirm Lacey’s conviction and the sentence imposed.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge

⁵Although the state offered conviction records in four cause numbers, the court only found the state had “proven by clear and convincing evidence, as well as beyond a reasonable doubt,” that Lacey had three historical prior felony convictions in cause numbers CR53255, CR66229, and CR67156.